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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

———

TRANSAMERICAN NATURAL GAS CORPORATION
(formerly GHR Energy Corporation),
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR and
WILLIAM P. CLARK, Secretary of the Interior,
Respondents.

———

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

———

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32pp

QUESTIONS PRESENTED

1. When the Government under authority of a statute such as the Outer Continental Shelf Lands Act enters into a commercial contract to sell its oil to a member of the public, WHETHER the Government is immune from an action alleging breach of the contract.

2. When the Government under color of contract right makes wrongful demand for payment of money which is then paid, WHETHER the Government has taken private property without just compensation.

3. When the Government acts in a way giving rise to a legally cognizable private claim against the Government arising either out of contract or out of the Economic Stabilization Act and the Emergency Petroleum Allocation Act, WHETHER the original jurisdiction of the claim is found in the United States district courts or the United States Claims Court or both, and WHETHER the appellate jurisdiction is found in a United States circuit court of appeals or the Temporary Emergency Court of Appeals or both.

4. When the Government by statute creates a system of appellate review whereby co-equal courts independently determine the scopes of their reviews issue-by-issue within a single controversy resolved by a single judgment, and such system permits some reviewable issues to be reviewed by neither court and all reviewable issues to be reviewed by each court with inconsistent results, WHETHER such system of review comports with due process of law, and WHETHER the appellate jurisdiction of the Supreme Court of the United States thereby is invoked by operation of law.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

The parent company of petitioner TransAmerican Natural Gas Corporation ("TransAmerican") is The GHR Companies, Inc. TransAmerican's affiliates and subsidiaries (other than wholly owned subsidiaries) are as follows:

Southwest Texas Services, Inc.
TransAmerican Pipeline Corporation
(f/k/a GHR Pipeline Corp.)
TransAmerican Gas Transmission
Corporation (f/k/a GHR Transmission Corp.)
Southern States, Inc.
Southern States Exploration, Inc.
Southern Petroleum Trading Company, Ltd.
Laredo Exploration, Inc.
JRS Realty, Inc.
TCP Construction Co., Inc.
Southern Exploration and Production Corporation
Industrial Financial Services, Inc.

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UNITED STATES DEPARTMENT OF THE INTERIOR and
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioner TransAmerican Natural Gas Corporation [1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals of the United States ("TECA"), entered in the above-captioned case on March 25, 1987.

OPINION BELOW

The opinion of the TECA (*see* Appendix), dated and issued March 25, 1987, has not yet been reported. Proceedings in the Fifth Circuit have not yet reached judgment. The United States District Court for the Eastern District of Louisiana did not issue either an opinion or findings of fact and conclusions of law.

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[1] Formerly GHR Energy Corporation. The caption of the case in this Court contains the names of all the parties to the proceedings in the TECA.

JURISDICTION

The judgment of the TECA, dated and entered as of March 25, 1987, dismisses petitioner's appeal from the judgment of the United States District Court for the Eastern District of Louisiana, entered December 4, 1985, dismissing petitioner's complaint.[2] This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1) (1982), and under Section 211(g) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C.A. § 1904 note (West 1980) (expired April 30, 1974), as incorporated by the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. §§ 751-760h (1982).

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. § 1491 (1982), provides in pertinent part:

> § 1491. Claims against United States generally; . . .
>
> (a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The Tucker Act, 28 U.S.C. § 1346 (1982), provides in pertinent part:

> § 1346. United States as defendant
>
> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> * * * *

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[2] We understand the TECA's judgment of "dismissal" of the appeal to comprise, in the context of the opinion, a disposition of the appeal on the merits by an affirmance of the district court's judgment.

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, ...

The Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356 (1982 & Supp. III 1986), provides in pertinent part:

§ 1353. Federal purchase and disposition of oil and gas

* * * *

(b) Sale of oil by United States to public; disposition of oil to small refiners; application of other laws

(1) The Secretary, except as provided in this subsection, may offer to the public and sell by competitive bidding for not more than its regulated price, or, if no regulated price applies, not less than its fair market value, any part of the oil (A) obtained by the United States pursuant to any lease as royalty or net profit share, or (B) purchased by the United States pursuant to subsection (a) (2) of this section.

§ 1349. Citizens suits, jurisdiction and judicial review

(a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security

(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter

against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

Section 210 of the ESA provided in pertinent part:

§ 210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to limitations in section 211), and/or damages.

Section 211 of the ESA provided in pertinent part:

§ 211. Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; . . . .

(b) (1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. . . . In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. . . .

> (2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

Section 1631 of 28 U.S.C. (1982) provides in pertinent part:

> § 1631. Transfer to cure want of jurisdiction
>
> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal . . . is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

STATEMENT OF THE CASE

All proceedings thus far in this case arise from an order pursuant to Rule 12, Fed. R. Civ. P., dismissing petitioner's complaint on respondents' motion raising sovereign immunity. There has not been discovery, amendment of the pleadings, or trial. The case presents the repudiation by an agency of the United States of America of obligations of the United States of America entered into under three admitted and authorized contracts. It also presents the disharmony of four courts of the United States (a United States district court, the Claims Court, a court of appeals, and the TECA), each seemingly having been given piecemeal original or ap-

pellate jurisdictions by Congress, confronting unsuccessfully the task of determining whether among their several jurisdictions a forum exists for petitioner's claims and those of many others similarly situated. Petitioner has pursued every device for invoking these confused jurisdictions and avoiding the injustice of having its claims dismissed unheard, all to no avail.

The Pleadings

The complaint alleges three written contracts, admitted by respondents, entered into by respondents under the authority of the OCSLA, and pursuant to which petitioner purchased large quantities of oil from the Department of the Interior ("DOI") in the period from April 1974 through July 1981. The complaint further alleges that each of the contracts contained a clause limiting the purchase price of the oil in accordance with regulations of the Department of Energy then in effect. The complaint further alleges that DOI charged petitioner in excess of the contract price by charging $369,926.08 in administrative fees in connection with the sales, and by charging petitioner $1,794,368.60 for transportation charges.

These operative allegations are pleaded as five separately sufficient claims for relief against the United States in contract, unlawful exaction, unconstitutional taking of private property, and restitution. Respondents' answer, while admitting the contracts as matters of fact, denies liability under them or under any of the claims for relief, and sets up, among others, the defense that petitioner's claims are "barred by the doctrine of sovereign immunity."

Proceedings in the District Court

After joinder of issue, the district court stayed proceedings on DOI's motion, which advised that a decision of the TECA in an action entitled *Lunday-Thagard Co.*

v. DOI, which had similarities to this case, would likely be dispositive of this action. On July 16, 1985, the TECA rendered its decision in the *Lunday-Thagard* case, which later was reported at 773 F.2d 322.

The *Lunday-Thagard* decision distinguished between that part of Lunday-Thagard's claim which arose out of two statutes (*viz.*, ESA and EPAA) and that which arose out of contract. *Lunday-Thagard Co. v. DOI*, 773 F.2d 322, 323-24 (Temp. Emer. Ct. App. 1985), *cert. denied*, 106 S.Ct. 792 (1986). The decision held that the so-called "statutory" claims were barred under the doctrine of sovereign immunity because there was no express waiver of such immunity set forth in the ESA or the EPAA and because the Tucker Act's waiver of sovereign immunity did not apply. *Id.* The so-called "contract" claims were held not to be barred by sovereign immunity, and these claims were remanded to the district court for further proceedings or for presentation to the Claims Court. *Id.* at 325-26. The *Lunday-Thagard* court was not called upon to determine whether the respondent's conduct was an unlawful taking, constituted an unlawful exaction, or required restitution.

The *Lunday-Thagard* decision having been rendered, DOI then moved, pursuant to Rule 12(b)(1), Fed. R. Civ. P., for dismissal of petitioner's complaint on a single ground, as follows: "for lack of jurisdiction of the subject matter under the doctrine of sovereign immunity, . . . based upon the final decision by the [TECA] in *Lunday-Thagard Co. v. DOI*, . . . which is the controlling law in this case." Petitioner opposed the motion to dismiss, and, based upon the TECA's remand to the district court of that part of the *Lunday-Thagard* case concerning contract claims, petitioner also conditionally moved for the transfer of this action to the United States Claims Court, pursuant to 28 U.S.C., Section 1631, if the district court determined that the *Lunday-Thagard* decision controlled.

By a "minute" entry, dated November 22, 1985, unaccompanied by memorandum, findings of fact, or conclusions of law, the district court granted DOI's motion and denied petitioner's conditional motion in an order not affording petitioner any opportunity to replead. The order was followed by entry on December 4, 1985, of a judgment dismissing the complaint. Believing that an appeal to the TECA alone would be insufficient to invoke a complete appellate review of the issues merged into the district court's judgment, petitioner appealed on December 24, 1985, to the TECA and to the United States Court of Appeals for the Fifth Circuit from the order and judgment. Each notice of appeal specifically invoked the separate, non-concurrent appellate jurisdictions of each court by stating that the appeal was taken "specifically from each and every part [of the order and judgment] within the appellate jurisdiction of the court to which the appeal is taken."

Proceedings in the Fifth Circuit

Shortly after the appeals were taken, respondents moved in the Fifth Circuit to stay the appeal "pending the final disposition of GHR Energy Corp.'s appeal to the [TECA]" in this case. Over petitioner's objection, respondents' motion was granted by order of the Fifth Circuit filed without opinion on February 13, 1986.

Petitioner thereupon moved for reconsideration of the stay decision and, alternatively, for certification of the following question from the Fifth Circuit to this Court, pursuant to 28 U.S.C., Section 1254(3):

> Where simultaneous appeals are taken in a single case to the Temporary Emergency Court of Appeals and to the appropriate court of appeals for a judicial circuit from a final order and judgment of a district court dismissing a complaint, and where such simultaneous appeals invoke the separate and non-concurrent appellate jurisdictions of each court, whether it

> is appropriate for either the Temporary Emergency Court of Appeals or the court of appeals to stay proceedings on the merits for the purpose of deferring to the other court's ruling on the case, or whether, instead, it is appropriate for both courts to proceed independently to a determination of all issues determined by each of such courts to be within its jurisdiction.

(Petitioner simultaneously moved in the TECA for certification of the same question from the TECA to this Court and, alternatively, to stay proceedings in the TECA.) Respondents opposed the motion to the Fifth Circuit (and also the motion to the TECA). By order filed March 18, 1986, the Fifth Circuit denied petitioner's motion for reconsideration of the stay of proceedings in that court and also denied petitioner's alternative request for certification of the stated question to this Court. (Petitioner's motion in the TECA remains undetermined.)[3]

Proceedings in the TECA

Petitioner's appeal to the TECA became fully submitted on March 10, 1986.[4] Petitioner urged (i) that the district court's decision misapplied *Lunday-Thagard* by dismissing petitioner's contract claims, which *Lunday-Thagard* had held to be non-ESA claims, and by also dismissing those claims grounded on unlawful exaction, un-

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[3] The TECA having now rendered its decision, petitioner intends to seek a lifting of the stay of proceedings in the Fifth Circuit and to prosecute its appeal there to a final judgment.

[4] Apart form the previously mentioned motion for a stay and, alternatively, for certification of a question to this Court, petitioner moved in the TECA concerning certain questions of practice and jurisdiction. Thus, petitioner moved, pursuant to 28 U.S.C., Section 1631, for an order "transferring those issues raised on appeal . . . which this court determines are not within its jurisdiction . . . to the [Fifth Circuit]." Respondents opposed this and other motions, and they were never ruled upon by the TECA.

constitutional taking, and restitution; (ii) that *Lunday-Thagard* was *contra* this Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983) [hereafter, "*Mitchell II*," to distinguish it from *United States v. Mitchell*, 445 U.S. 535 (1980)]; and (iii) that the TECA transfer to the Fifth Circuit for determination, pursuant to 28 U.S.C., Section 1631, such issues as it found not to be within its own appellate jurisdiction.

The TECA's decision, issued March 25, 1987, purported to resolve all issues raised on appeal, including the respective original or appellate jurisdictions of the TECA, the Fifth Circuit, the district court, and the Claims Court in respect of all claims alleged in the complaint. The entire appeal was "dismissed," seemingly on the grounds that (i) all of petitioner's claims arose out of the ESA (rather than out of contract, or other statute, or the Constitution), a statute which contains no express waiver of sovereign immunity (Appendix, at 6a-9a), and (ii) the Tucker Act's express waiver of sovereign immunity for claims arising out of the Constitution, statute, or contract did not apply to claims viewed as arising out of the ESA (Appendix, at 5a-6a). No issues were transferred for determination to the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

I. This Petition Presents Important Issues Concerning the Liability of the United States on Contracts to Which it is a Party

This Court has granted certiorari where the lower court's decision "raises issues of substantial importance concerning the liability of the United States." *Mitchell II, supra*, 463 U.S. at 211 & n.7 (1983) (noting that "the damages claimed in this suit alone may amount to $100 million"). Such is the case here. The TECA's decision precludes not only petitioner, but also all other purchasers of government oil, from bringing to the courts

the Government's breaches of contracts in cases alleging payments in excess of the purchase price specified in the contracts. The Government's potential total liability to such purchasers for crude oil sales during the period of price regulation is said to exceed $1,000,000,000. *See Department of the Interior*, [12 DOE 1984-1985 Decisions] Energy Mgmt. (CCH) ¶ 81,012, at 82,567 (Sept. 19, 1984).

The TECA's decision is troubling particularly in that it forecloses claimants not only from invoking the jurisdiction of the federal district courts under the ESA, but also from invoking the jurisdiction of the district courts or the United States Claims Court, depending on the amount in controversy, under the Tucker Act (Appendix, at 5a-6a, 7a-9a). Thus, petitioner and the many claimants similarly situated are confronted with the result that an agency of the United States has repudiated its admitted contracts with private citizens and has procured from a "temporary" court of the United States a judgment that no federal court is available to determine any of the claims, be they viewed as "statutory" claims involving contracts, or "contract-based" claims involving the interpretation of statutes. This result is especially unjust given the many parties and the magnitude of the claims involved, the potential for misapplication of the TECA's erroneous sovereign immunity decision in the wide range of cases "arising under" other federal statutes not containing express waivers of sovereign immunity, and the erosion of public confidence produced by a decision that relieves the United States of accountability in a large class of commercial contracts.

II. This Petition Presents an Opportunity for the Court to Reconcile Disharmonious Decisions of the Federal Courts Concerning Their Respective Jurisdictions to Hear Petitioner's Claims

Wisely or unwisely, it has been held that Congress has created separate, *non*-concurrent appellate jurisdictions in the TECA and in the circuit courts of appeals. Jurisdic-

tion is based on issues presented. Neither court is inferior or superior. So-called "EPAA" or "ESA" issues are determined by the TECA; "non-EPAA" or "non-ESA" issues are determined by the courts of appeals.[5] The Fifth Circuit has described the jurisdictional plan as follows:

> Interpretation of the TECA's jurisdiction as "issue related" has resulted in "the development of a system of bifurcated appeals from unitary judgments," . . . under which appeals raising both EPAA and non-EPAA issues are split between the TECA and the appropriate circuit court of appeals.

United States v. Wyatt, 680 F.2d 1080, 1085 n.7 (5th Cir. 1982) (citations omitted). The TECA, too, has acknowledged this "bifurcated" jurisdictional plan, noting in *Texaco Inc. v. DOE*, 616 F.2d 1193, 1197 (Temp. Emer. Ct. App. 1979), that its statutory grant of jurisdiction requires a strict construction of the issues it may determine:

> . . . [J]urisdiction is not an either-or proposition with regard to the case as a whole. Rather the [TECA] takes jurisdiction over those issues which it has authority to decide, refusing to hear any others, although they are all part of the same case or controversy . . . .
>
> Defendants may be accurate in saying that the possibility of dual appellate review is confusing. But this Court has faced that possibility and endorsed it, as have the Courts of Appeal.

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[5] This "bifurcated" system inevitably creates confusion. *See Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179, 183 (2d Cir. 1979). Noting that 30% of the appeals decided by the TECA are on jurisdictional grounds, one of the TECA's judges was prompted to "wonder as to the wisdom and necessity of creating a special court such as TECA." *Texaco Inc. v. DOE*, 616 F.2d 1193, 1199 (Temp. Emer. Ct. App. 1979) (Hoffman, J., dissenting).

The problem with this jurisdictional plan, if such it be, is that Congress has failed to draw the boundary line between ESA issues (triable, presumably, in the district courts and reviewable in the TECA) and non-ESA issues (triable, presumably, in the district courts and the Claims Court and reviewable by the courts of appeals), and has failed to declare who is to draw the boundary line. These tasks are left to the courts, but neither set of courts is empowered to draw the line for the other, and only this Court can resolve boundary disputes and award unclaimed territories.

The hazards for litigants in this unusual jurisdictional scheme are apparent, and their existence is unwarranted. In peril of forfeiting appeal rights in a case that *may* present both ESA and non-ESA issues, a litigant *must* prosecute parallel appeals. Having done so, the litigant risks inconsistent yet nonetheless binding results in a single case or controversy. Alternatively, and in the absence of firm direction from this Court, a litigant realistically is confined to a single, incomplete review in the court that reaches its decision first, for where one court purports to define its own jurisdiction, the other will not be inclined to disagree. The petition should be granted, therefore, so that the Court can give guidance to the lower federal courts in delineating their jurisdictions and protect litigants from the confusion arising from the standing case law.

III. The Decision Below is Erroneous and Represents a Misapplication of this Court's Holding in *Mitchell II*

In the decision below, the TECA confounds the Tucker Act's jurisdiction-conferring role with its separate role as a waiver of the Government's immunity to suit in certain classes of cases. In *Mitchell II*, this Court was at pains to "resolve th[e] confusion" that had arisen concerning "whether the Tucker Act constitutes a waiver of sovereign immunity." *Mitchell II*, *supra*, 463 U.S. at

212. Despite the Court's teaching that "there is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages," *id.* at 218, and that "[i]f a claim falls within this *category*, the existence of a waiver of sovereign immunity is clear," *id.* (emphasis added), the TECA erroneously confined the Tucker Act's broad waiver strictly to actions invoking the Tucker Act's conferral of jurisdiction on the district courts and the Claims Court (Appendix, at 5a-6a). Moreover, *Mitchell II* specifically admonishes that "[b]ecause the Tucker Act supplies a waiver of immunity for claims of this nature [*i.e.*, claims "founded upon statutes or regulations that create substantive rights to money damages"], the separate statutes and regulations need not provide a second waiver of sovereign immunity . . . ." *Id.* at 218-19. Nonetheless, the TECA in this case sets up the absence of an express waiver of sovereign immunity in the ESA as a reason for extinguishing petitioner's claims (Appendix, at 9a).

The Tucker Act does not itself confer substantive rights. *Mitchell II*, *supra*, 463 U.S. at 216. It does, however, define categories of cases and claims as to which the Government has waived its immunity from suit. *Id.* at 215, 218. Whether this action presents "statutory" or "contract" claims, the claims are indisputably within the categories for which the Tucker Act constitutes a waiver of sovereign immunity, and the claims, therefore, should not have been dismissed. The TECA reasons, nonetheless, that *Mitchell II*'s teachings—and the Tucker Act's waiver—extend only to cases "committed to" the Claims Court (Appendix, at 5a). Neither *Mitchell II* nor the Tucker Act, however, is so self-limiting, and such a narrow interpretation of *Mitchell II* directly contravenes the thrust of its general instruction.

Contracts with the United States "are property and create vested rights," *Lynch v. United States*, 292 U.S. 571, 577 (1934), and "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Id.* at 579 (citations omitted). The terms of such contracts may often "be found in part in the [contracts], [and] in part in the statutes under which they are [entered into] and the regulations promulgated thereunder." *Id.* at 577. As a party to such contracts, petitioner stands in a much different position from the recipient of a government gratuity or benevolence, and it has been suggested that cases involving the Government's breach of its own contracts warrant a more vigorous standard of review than cases alleging the Government's impairment of the contract rights subsisting between private parties. *See National R. Passenger Corp. v. Atchison, T. & S.F.R. Co.*, 470 U.S. 451, 471-72 & n.24 (1985). Before such highly valued rights, held by petitioner and many others similarly situated, are summarily extinguished as a result of the TECA's labored and inconsistent rulings in this case and in *Lunday-Thagard*, this Court ought to revisit the sovereign immunity issue to "resolve the confusion" that still abounds and to rectify an error that will have effects far beyond the confines of this particular action.

CONCLUSION

The petition for a writ of certiorari should be granted. If the Court, in its discretion, determines that it is preferable, under the circumstances shown in the petition, to defer consideration of some or all of the issues presented by the petition until the Fifth Circuit has disposed of petitioner's appeal there, then the Court should grant petitioner's accompanying motion for deferral of consideration of the petition.

Dated: New York, New York
April 24, 1987

Respectfully submitted,

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APPENDIX

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-118

TRANSAMERICAN NATURAL GAS CORP.
(formerly GHR ENERGY CORP.),
Plaintiff-Appellant,

v.

UNITED STATES DEPT. OF INTERIOR, *et al.*,
Defendant-Appellee.

On appeal from the United States District Court
for the Eastern District of Louisiana
(District Court C.A. No. 84-1520 Section E)

(Submitted on the briefs Decided: March 25, 1987)

EDWARD C. CERNY, III and James L. Marketos, Lane & Mittendorf, New York, New York, were on the brief for the Plaintiff-Appellant.

RICHARD K. WILLARD, Assistant Attorney General, and Stephen E. Hart, Thomas Millet and Leslie K. Dellon, U.S. Department of Justice, Washington, D.C., were on the brief for Defendants-Appellees.

Before GARZA, THORNBERRY, and SEAR, Judges.

GARZA, Judge.

This case concerns the scope of the government's sovereign immunity and the applicability of a previous panel decision, *Lunday-Thagard v. United States*, 773 F.2d 322 (TECA 1985), *cert. denied*, 106 S.Ct. 792 (1986) to the facts in the case at bar. For the reasons set out below, and especially the intervening decisions of the U.S.

Claims Court, we agree with the district court's decision to dismiss the entire complaint for want of subject matter jurisdiction.

BACKGROUND

The federal government established a pricing and allocation program for the domestic oil industry during the energy crisis of the early 1970's. The Department of the Interior created a "royalty oil program" under the Outer Continental Shelf Lands Act (OCSLA), which authorized the Secretary of the Interior to grant oil and gas leases on offshore lands. 43 U.S.C. § 1331, *et seq.* This offshore royalty oil could be sold "for not more than its regulated price, or if no regulated price applies, not less than its fair market value." 43 U.S.C. § 1353(b)(1). Section 210 of the Economic Stabilization Act of 1970 (ESA), as amended (12 U.S.C. § 1904 note (1982)), authorized suits for "damages or other relief" against all "persons" for violations of the offshore royalty oil program. Section 211 of the ESA vested exclusive jurisdiction over cases arising under the ESA, and, later, the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 751 *et seq.*, in the district courts. The Temporary Emergency Court of Appeals (TECA) was also created to have exclusive jurisdiction of all appeals arising under the ESA and EPAA. § 211 (b)(2) (ESA); § 754(a)(1) (EPAA); *MGPC, Inc. v. Dept. of Energy*, 673 F.2d 1277, 1280-81 (TECA 1982).

Plaintiff TransAmerican Natural Gas Corp. (TransAmerican)[1] purchased crude oil from the United States which the government received as its royalty oil interest from offshore leases on the Outer Continental Shelf near Louisiana. TransAmerican had three contracts with the United States: 1) from February 1, 1973 to February 1, 1976 (No. 12445); 2) from September 16, 1973 to

[1] Prior to October 1, 1985, TransAmerican's business name was GHR Energy Corp.

February 1, 1976 (No. 13781); and 3) from July 12, 1976 to July 1, 1980 (No. 15543). All three contracts began and ended before price controls were terminated pursuant to Executive Order on January 28, 1981.[2] More than three years after the price controls were lifted, on March 28, 1984, TransAmerican sued the United States in the U.S. District Court for the Eastern District of Louisiana for damages resulting from "overcharges" and transportation payments under the purchase contracts for offshore royalty oil. TransAmerican alleges that the contracts already included the price of transporting the offshore royalty oil to the point of delivery on land; TransAmerican claims it paid more than the maximum lawful price since TransAmerican paid for the transportation of the oil from the offshore drilling stations in addition to the contract price. The Complaint filed by TransAmerican specifies five different theories of recovery: Count I alleges contract damages and administrative fees due under ESA and EPAA; Count II alleges the unlawful imposition of transportation charges; Count III characterizes the government's alleged conduct as an "unlawful exaction" contrary to the governing statutes and regulations; Count V asserts a claim for restitution of [*sic*] the facts presented. Count IV alleges a constitutional claim for the unlawful taking of property in violation of the Fifth Amendment.

The United States denies the substance of these allegations. Furthermore, the United States maintains that it has not waived its sovereign immunity in actions under the ESA and EPAA and, consequently, TransAmerican's suit should be dismissed for want of subject matter jurisdiction. A previous TECA case, *Lunday-Thagard Co. v. United States*, *supra*, held that ESA §§ 210 and 211 do not constitute a waiver of sovereign immunity for claims arising under the ESA and EPAA. The government urges *stare decisis* upon this panel. In the alternative,

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[2] Executive Order No. 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981).

the United States argues that TransAmerican's claims are barred by the statute of limitations.[3]

The district court granted the government's motion to dismiss for lack of jurisdiction without entering formal findings or a memorandum opinion. TransAmerican appealed this decision both to TECA and to the Fifth Circuit. The Fifth Circuit has stayed consideration of TransAmerican's appeal[4] until a decision by this TECA panel is rendered.

DISCUSSION

TransAmerican contends that *Lunday-Thagard* conflicts with the U.S. Supreme Court's decision in *United States v. Mitchell*, 463 U.S. [2]06 (1983), and, therefore, *Lunday-Thagard* should not be followed. In the alternative, if the previous TECA decision of *Lunday-Thagard* is found to be controlling, TransAmerican argues that its transportation payments claim and Fifth Amendment

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[3] While we note that TransAmerican did not file suit until eleven years after it first began purchasing royalty oil and more than three years after the removal of price controls, we do not reach this issue because of our conclusion that no subject matter jurisdiction exists. However, our decision in *Johnson Oil Co. v. DOE and Southwestern Refining Co.*, 690 F.2d 191 (TECA 1982) foreclosed application of Louisiana's ten year limitations period to cases involving the national policy of ending regulation of the oil industry. Any other limitations period would seem to foreclose relief here. *See Lunday-Thagard v. United States*, 620 F.Supp. 3 (W.D. La. 1984) (district court found one year statute of limitations applies); 28 U.S.C. 2401(a) (general six year statute of limitations period when no other limitations period applicable) *but see Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 809 (TECA), *cert. denied*, 105 S.Ct. 173 (1984) (cause of action accrues from *first* overcharge); *CPI Crude, Inc. v. Coffman*, 776 F.2d 1546, 1551-53 (TECA 1985) (same).

[4] Case No. 85-3816 (U.S. Dept. of Interior's Motion to Stay Proceedings granted on Feb. 13, 1986; TransAmerican's Motion for Reconsideration or, in the alternative, certification of question to Supreme Court denied on March 18, 1986).

takings claim should not have been dismissed. The government asserts that the failure to waive sovereign immunity is determinative of all issues raised.

A) In *Lunday-Thagard Co. v. United States*[,] 773 F.2d 322 (TECA 1985), *cert. denied*, 106 S.Ct. 792 (1986), this Court held that ESA §§ 210 and 211 do not waive the government's sovereign immunity from suit. TransAmerican attempts to distinguish and discredit the reasoning of the *Lunday-Thagard* panel and challenges it as contrary to the controlling Supreme Court case on sovereign immunity, *United States v. Mitchell*, 463 U.S. 206 (1983).

In *Mitchell* the Supreme Court held that the jurisdiction conferred by the Tucker Act contained an express waiver of sovereign immunity. Though the Tucker Act did not by its own terms create a substantive remedy, once "the Constitution, an Act of Congress, or any regulation of an executive department" can be fairly interpreted as mandating compensation by the federal government for damages sustained, then the United States is amenable to suit. *Mitchell*, 463 U.S. at 216; 28 U.S.C. § 1491 (Tucker Act). TransAmerican hangs its hat on the language in *Mitchell* explaining that the determination of sovereign immunity is "analytically distinct" from the evaluation of whether a substantive statute creates a damages remedy. Since TransAmerican's "contract-based" claims are a *type* of claim for which the Tucker Act affords a remedy, TransAmerican concludes that sovereign immunity does not bar this suit.

However, the analysis employed in *Lunday-Thagard* and other courts concerning the ESA and EPAA is to the contrary. While the Tucker Act does embody a waiver of sovereign immunity for claims against the United States committed to the Claims Court, Congress specifically placed jurisdiction of *all* EPAA and ESA claims in the *district courts*. ESA § 211. The U.S. Claims

Court has held that in view of § 211, it has no jurisdiction to review actions brought under § 210. *The Poole & Kent Co. v. United States*, 566 F.2d 1189, 214 Ct. Cl. 836 (1977); *Tipperary Refining Co. v. United States*, No. 283-86C (Ct. Cl. Jan. 23, 1987). TECA also previously rejected a claim that § 211 is a specific enactment which creates an exception to the jurisdiction of the Tucker Act. *McCulloch Gas Processing Corp. v. Canadian Hidrogas Resources, Ltd.*, 577 F.2d 712, 715-16 (TECA) [,] *cert. denied*, 439 U.S. 831 (1978). The Tucker Act does not supply a waiver of sovereign immunity for the ESA or actions under the EPAA. Therefore, the government's sovereign immunity remains inviolate; the United States is immune from suit for money damages allegedly caused by violations of the ESA and EPAA.

B) TransAmerican argues that if *Lunday-Thagard* is found to be controlling, then the takings claim and transportation payments claim should not have been dismissed. The *Lunday-Thagard* panel found that the transportation payments claim presented in the pleadings was a "non-EPAA" claim and, thus, not barred by sovereign immunity. 773 F.2d at 325. Another TECA case, *Griffin v. United States*, 537 F.2d 1130 (TECA), *cert. denied*, 429 U.S. 919 (1976) held that ESA § 210 could provide a cause of action for an unconstitutional taking, though the *Griffin* panel found no claim actually presented. *See also McCulloch Gas, supra*, 577 F.2d at 716-17. TransAmerican asks us to reinstate the takings and transportation payment claims and transfer them to the U.S. Claims Court for further consideration.

The fact that the *Lunday-Thagard* panel characterized Lunday-Thagard's pleading as presenting a potential "non-EPAA" issue does not foreclose our review of TransAmerican's conplaint. The *Lunday-Thagard* Court held only that the complaint *as drafted* could be construed as presenting a non-EPAA contract claim and the claim was remanded to the district court for considera-

tion.[5] In a recent consolidated decision concerning claims on a royalty oil contract similar to TransAmerican's, *Tipperary Refining Co. v. United States* (Case No. 283-86C) and *DeMenno/Kerdoon v. United States* (Case No. 299-86C) (Ct. Cl. Jan. 23, 1987), the U. S. Claims Court held that Fifth Amendment takings claims and other claims "related to" the ESA, EPAA and U. S. Dept. of Energy (DOE) pricing regulations arise only because of statutory claims precluded by sovereign immunity:

> "In summary, the core of each of the claims under the Tucker Act presented in plaintiffs' complaints that arise during the period of regulation is a violation of the pricing regulations. Absent the central issues of the alleged violations of ESA, EPAA and DOE implementing regulations, no claim would exist for breach of contract, violation of statute or regulation, illegal exaction, or 5th Amendment taking.
>
> * * *
>
> Accordingly, incorporation of ESA § 211 in the EPAA withdrew the jurisdiction of this [Claims] Court over plaintiffs' claims. . . ."

Tipperary and *DeMenno/Kerdoon*, slip op. at 6, 8. The Claims Court found it simply lacked jurisdiction to hear claims largely dependent upon interpretation of ESA or EPAA violations: it will not hear cases concerning Fifth Amendment takings claims or transportation payment claims which have as a factual genesis contracts entered into under the ESA and EPAA. The Claims Court has adopted the position advanced by the United States in this case—that both the takings and transpor-

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[5] The district court properly dismissed Lunday-Thagard's complaint without prejudice since the amount in controversy exceeded $10,000. Lunday-Thagard then proceeded to file in the U.S. Claims Court. (Cl. Ct. Case No. 408-86C). The government has renewed its argument that this claim is indivisible from the claims for violations of the ESA and EPAA and petitioned the Claims Court to dismiss the case.

tation payment claims arise from the offshore royalty oil purchase contracts. In essence, the position is that TransAmerican's claim would not exist but for the EPAA and ESA and therefore should be dismissed.

This Court and other Courts of Appeals have also consistently recognized that when purported contract claims are inseparable from alleged violations of the ESA, EPAA or the price regulations promulgated thereunder, those claims arise under § 210 of the ESA. *See, e.g., Johnson Oil Co. v. DOE and Southwestern Refining Co.*, 690 F.2d 191, 196 (TECA 1982) ("dominant claim" alleged a "violation of the pricing regulations"); *Francis Oil & Gas, Inc. v. Exxon Corp.*, 687 F.2d 484, 487 (TECA), *cert. denied*, 459 U.S. 1010 (1982); *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1384 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979). *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 591 F.2d 711, 715-16 (TECA) (per curiam), *cert. denied*, 444 U.S. 879 (1979).

Although TransAmerican requests that the claims cognizable under *Lunday-Thagard* be transferred by this Court to the Claims Court, if the case is transferred the Claims Court will dismiss the case because the gravamen of the complaint will be interpreted as statutory-derived claims under the ESA and EPAA similar to *Tipperary* and *DeMenno/Kerdoon*[6] and, consequently, the Claims Court will not have jurisdiction to hear TransAmerican's complaint. While ESA § 210 does not bar a cause of action for an unconstitutional taking, TransAmerican's supposed "takings" claim presents solely a statutory claim for overcharges.[7] Similarly, Trans-

[6] The plaintiffs in *Tipperary* and *DeMenno/Kerdoon* raised a Fifth Amendment claim and transportation payments claim almost identical to TransAmerican's claims here.

[7] TransAmerican's "takings" claim consists solely of the $2,164,294.68 damages allegedly sustained due to the breach of the royalty oil purchase contract. Of course, when the government

American's own explanation for its transportation payments claim conclusively demonstrates that it is grounded in the ESA and EPAA.[8] Rather than waste precious judicial time and resources in returning this case to the district court for a subsequent transfer to the Claims Court for further proceedings, it is the duty of this Court to resolve any possible conflicts over the ultimate existence of subject matter jurisdiction. We hold that all of TransAmerican's claims must be dismissed because they do not exist separate from the federal statutes which contain no waiver of the United States' sovereign immunity from suit.

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takes physical possession of money or property which is not lawfully owed to the government, a taking can occur. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (taking of interest on interpleader fund not justified as payment of obligation to government). However, when the determination of an amount "lawfully owed" the government requires interpretation of a contract entered into under authority of the ESA and EPAA, *any* breach of contract action could conceivably be characterized as an unconstitutional taking merely through creative pleadings. Such a rule would effectively eliminate the government's traditional immunity from suit. We decline to recognize a claim based *solely* on alleged contractual overcharges under the ESA, EPAA, and DOE pricing regulations as a constitutional takings claim which overcomes the sovereign immunity of the United States.

[8] According to TransAmerican, the price regulations (10 C.F.R. § 210.62(a) and (c)) required the Dept. of Interior (DOI) to charge TransAmerican a price for the royalty oil which included onshore delivery. Thus, TransAmerican was allegedly overcharged when it also had to pay the operators of the offshore oil wells to deliver the royalty oil from the offshore platform. TransAmerican maintains it is "entitled to a judgment . . . ordering DOI to refund to [TransAmerican] the entire amount of such unlawful overcharges plus interest in accordance with section 210 of the ESA as incorporated by section 5 of the EPAA." Complaint, ¶¶ 25, 28. The exclusive remedy for such a violation, though, is set forth in ESA § 210. When an alleged contractual claim goes to a violation of the EPAA, that claim is cognizable only as a statutory claim. *Lunday-Thagard*, 773 F.2d 326; *Johnson Oil Co. v. DOE and Southwestern Refining Co.*, 690 F.2d 191 (TECA 1982).

CONCLUSION

The case is controlled by the government's failure to waive sovereign immunity. Though represented well by the efforts of able counsel, TransAmerican's claim that sovereign immunity has been waived is contrary to our *Lunday-Thagard* decision. Moreover, the Fifth Amendment takings and transportation payment claims are not "non-EPAA" issues here. Though they are disguised in appropriate rhetoric, they are not divisible from their origin in ESA and EPAA statutory-based contracts and, therefore, are also barred due to sovereign immunity.

Appeal DISMISSED.

No. 86-1712

In the Supreme Court of the United States

OCTOBER TERM, 1986

TRANSAMERICAN NATURAL GAS CORPORATION,
PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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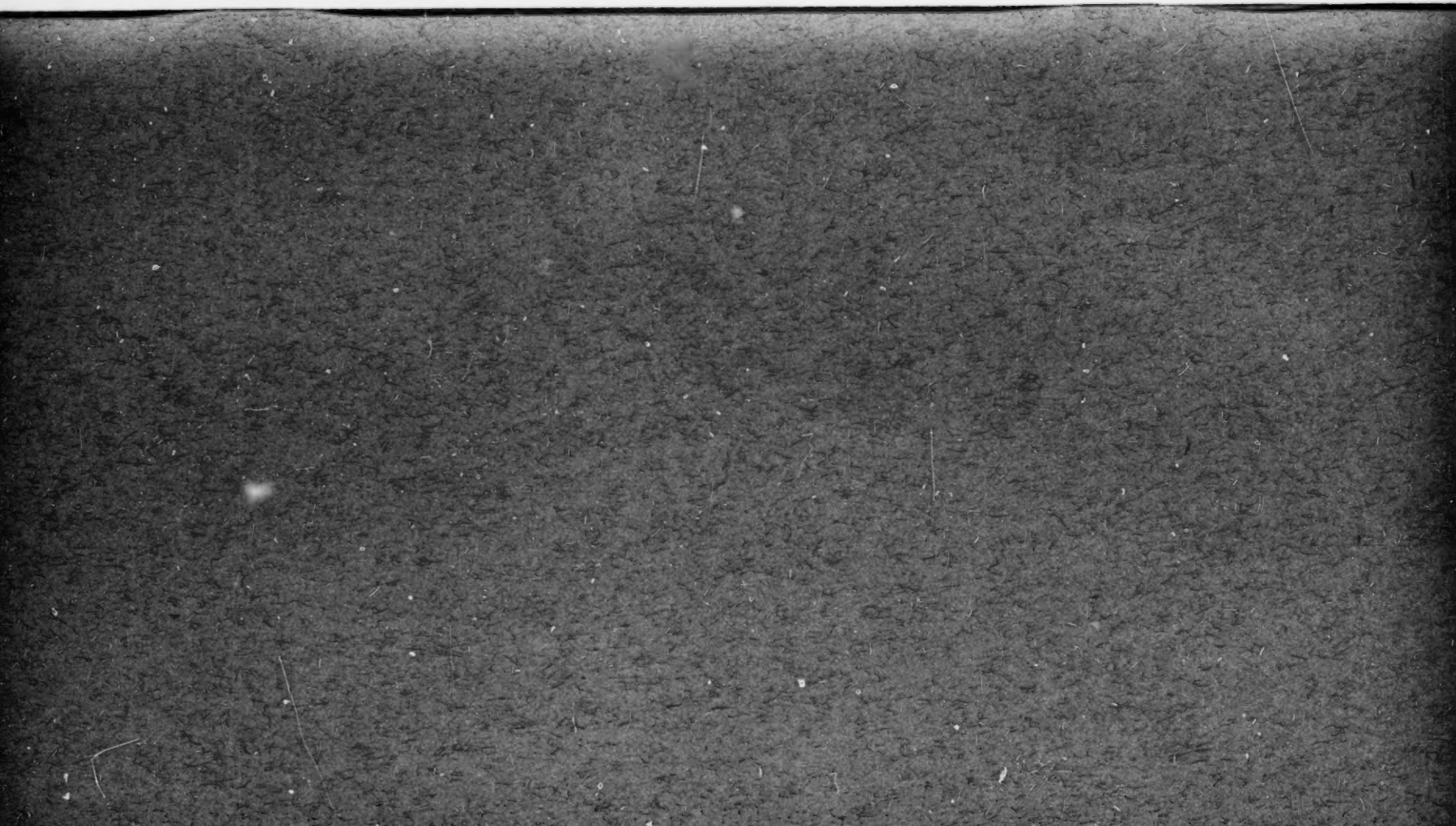

QUESTION PRESENTED

Whether sovereign immunity bars suits against the Federal government for money damages on account of alleged violations of price controls established under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1), and the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed. & Supp. IV 1980) 1904 note.

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UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 816 F.2d 689.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 25, 1987. The petition was

filed on April 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and under Section 211(g) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1).

STATEMENT

1. The Department of the Interior grants oil and gas leases on the Outer Continental Shelf under the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. III) 1331 *et seq.* The government retains a royalty interest in these leases, and the Secretary of the Interior is authorized to accept royalties in money or in kind. 43 U.S.C. 1353. If the Secretary elects to accept royalties in kind, the royalty oil may thereafter be sold to small independent refiners; if the Secretary makes any such sale, he must realize at least the same amount of money that the United States would have obtained if the royalties had originally been taken in cash. 43 U.S.C. 1334.

Petitioner is a small refiner of crude oil. In 1973 and 1976, petitioner entered into three contracts with the United States, through the United States Geological Survey, a sub-agency of the Department of the Interior, to purchase oil produced from offshore tracts in which the government had a royalty interest. Pet. App. 2a-3a. Until January 28, 1981, maximum prices for different categories or "tiers" of crude oil were set by the Department of Energy (DOE) through regulations promulgated under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1), and the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976

ed. & Supp. IV 1980) 1904 note. See, *e.g.*, 39 Fed. Reg. 1924 (1974); 41 Fed. Reg. 4931 (1976). The regulation of petroleum pricing ended on January 28, 1981. See Exec. Order No. 12,287, 3 C.F.R. 124 (1982).

2. Petitioner brought this action against the federal respondents in the United States District Court for the Eastern District of Louisiana for a refund under Section 210 of the ESA. Petitioner claimed that the Department of the Interior had sold oil to petitioner at a price in excess of the maximum lawful price established by DOE's regulations, because it charged petitioner administrative fees and transportation costs that exceeded the regulated price. Petitioner also contended that the overcharges constituted an unlawful exaction of money for which it was entitled to restitution, and an unlawful "taking" of property in violation of the Fifth Amendment for which it was entitled to "just compensation." Pet. App. 3a.

The district court dismissed petitioner's complaint for lack of jurisdiction. The court also denied petitioner's motion to transfer its action to the United States Claims Court pursuant to 28 U.S.C. 1631. Pet. App. 3a-4a.

3. Petitioner filed notices of appeal with both the Temporary Emergency Court of Appeals (TECA) and the Fifth Circuit. The Fifth Circuit stayed its proceedings pending TECA's disposition of petitioner's appeal. Pet. App. 4a. TECA affirmed the district court's dismissal of petitioner's complaint (*id.* at 1a-10a).

Relying on its prior decision in *Lunday-Thagard Co. v. United States Dep't of Interior*, 773 F.2d 322 (1985), cert. denied, No. 85-504 (Jan. 13, 1986),

TECA reaffirmed its view that the ESA and the EPAA do not waive the federal government's sovereign immunity from suit (Pet. App. 5a). The court next rejected (*id.* at 5a-6a) petitioner's claim that the waiver of sovereign immunity in the Tucker Act (28 U.S.C. 1491) allowed petitioner to bring suit under the ESA in a federal district court. The court of appeals said (Pet. App. 5a-6a) that the Tucker Act's waiver applies only to actions within the jurisdiction of the Claims Court, which could not hear petitioner's claim because the district courts have exclusive jurisdiction over suits arising under the EPAA and ESA.

Finally, the court of appeals rejected (Pet. App. 6a-9a) petitioner's alternative argument that its takings and transportation payment claims could be heard by (and should be transferred to) the Claims Court pursuant to the Tucker Act because they are "non-EPAA" claims. The court noted that the Claims Court had recently held that it "simply lacked jurisdiction to hear claims largely dependent upon interpretation of ESA or EPAA violations, [which include] * * * cases concerning Fifth Amendment takings claims or transportation payment claims which have as a factual genesis contracts entered into under ESA and EPAA." Pet. App. 7a (citing *Tipperary Refining Co.* v. *United States*, 11 Cl. Ct. 572 (1987), appeal pending, Nos. 87-1233 & 87-1234 (Fed. Cir.)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.[1]

1. The court of appeals in this case simply reaffirmed its prior rulings in *Lunday-Thagard Co.* v. *United States Dep't of Interior*, *supra*, and *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources, Ltd.*, 577 F.2d 712, cert. denied, 439 U.S. 831 (1978), that the EPAA and the ESA do not waive the federal government's sovereign immunity from damage actions based on alleged price control violations. This Court denied petitions for a writ of certiorari on both those prior occasions, and nothing has changed since those earlier denials, nor is there anything about this particular case, to suggest that different treatment is warranted.

Petitioner maintains (Pet. 13-15) that sovereign immunity has been waived because its claims under the ESA and the EPAA fall within the "category" of claims covered by the Tucker Act. This argument lacks merit. As the court of appeals held (Pet. App. 4a-6a (emphasis omitted)), "[w]hile the Tucker Act does embody a waiver of sovereign immunity for claims against the United States committed to the

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[1] Following TECA's decision, petitioner moved to lift the stay in the Fifth Circuit and has suggested here that the Court should defer consideration of its petition pending the outcome of the Fifth Circuit appeal. We disagree. While we agree that the Fifth Circuit should lift its stay, and have moved in that court to dismiss the appeal for lack of jurisdiction, we see no reason for this Court to postpone its consideration of the petition in this case, which presents no issue warranting review by this Court.

Claims Court, Congress specifically placed jurisdiction of all EPAA and ESA claims in the district courts." There is simply no merit to petitioner's suggestion that the ESA impliedly modified the Tucker Act so as to allow suit to be brought in any district court. Certainly, petitioner has failed to identify anything in the text or legislative history of the ESA demonstrating a "clear and manifest" congressional intent to repeal the Tucker Act's jurisdictional limitations. *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982) (citation omitted).

Nor does this Court's decision in *United States* v. *Mitchell*, 463 U.S. 206 (1983), suggest otherwise. In *Mitchell*, this Court ruled only "that by giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims" (463 U.S. at 212 (footnote omitted)). *Mitchell* in no way supports petitioner's suggestion, correctly rejected by the court of appeals, that the Tucker Act waives sovereign immunity for claims other than those over which the Court of Claims has been given jurisdiction. Indeed, *Mitchell* implicitly rejects that notion.[2]

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[2] The court of appeals also correctly affirmed the district court's denial of petitioner's motion, in the alternative, to transfer the case to the Claims Court. The Claims Court lacks jurisdiction to hear cases arising under the ESA and the EPAA. See ESA, 211(a), 12 U.S.C. (1976 ed.) 1904 note. And, as both the court of appeals in this case and the Claims Court have ruled, a litigant cannot escape the jurisdictional bar merely by couching what is essentially a claim arising under the ESA and the EPAA as a "taking" claim. See Pet. App. 6a-8a; *Tipperary Refining Co.* v. *United States*, 11 Cl. Ct. 572, 576-577 (1987).

2. Contrary to petitioner's contention (Pet. 11-13), review by this Court is not required "to reconcile disharmonious decisions of the federal courts concerning their respective jurisdictions to hear petitioner's claims." As illustrated by this case, the district courts, Claims Court, TECA, and Fifth Circuit have thus far successfully defined their respective jurisdictions to avoid unnecessary interference and duplication of effort. For instance, the Claims Court does not assert jurisdiction over claims, such as those raised in this case, grounded in the ESA and EPAA (see note 2, *supra*), and the Fifth Circuit properly stayed its proceedings in this case—over petitioner's objection—to avoid any interference with TECA's jurisdiction. Hence, contrary to petitioner's suggestion (Pet. 13), there are currently no "boundary disputes" for this Court to resolve or "unclaimed territories" for this Court to award.

3. Finally, petitioner argues (Pet. 10-11) that review is warranted because the issue presented by the petition is important. The question presented, however, is at best of historical, not current, importance. TECA's decision in this case involves price controls that terminated in January 1981. The predominant federal energy policy since the decontrol of the price of oil has been "to wind up regulation of the oil industry." *Johnson Oil Co.* v. *DOE*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982). Most of the previously filed overcharge claims against Interior have already been resolved, and new claims are barred by the applicable statute of limitations (see Pet. App. 4a n.3).[3] Petitioner's representation (Pet. 10-11) of the

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[3] Indeed, as we argued in the court of appeals, petitioner's claims are precluded by the applicable limitations period (see Pet. App. 4a n.3). Although the court of appeals did not reach

amount potentially at stake in this case fails to take account of either the previously-resolved claims or the expiration of the limitations period and therefore is grossly overstated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1987

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the limitations issue, the court suggested in dictum that the action "would seem" to be barred by the statute of limitations (*ibid.*).

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No. 86-1712

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANSAMERICAN NATURAL GAS CORPORATION
(formerly GHR Energy Corporation),
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR and
WILLIAM P. CLARK, Secretary of the Interior,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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STATUTES:

Economic Stabilization Act of 1970 ("ESA"), Pub. L. No. 91-379, tit. II, 84 Stat. 799 (1970) (expired April 30, 1974) (codified as amended at 12 U.S.C.A. Section 1904 note (West 1980) (Cost of Living Stabilization)) 2
Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. Sections 1331-1356 (1982 & Supp. III 1986) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1712

TRANSAMERICAN NATURAL GAS CORPORATION
(formerly GHR Energy Corporation),
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR and
WILLIAM P. CLARK, Secretary of the Interior,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. The Petition Presents Issues of Immediate, Not Merely Historical, Importance

Respondents misstate the case in urging that it involves nothing more than an arcane dispute over discontinued price controls (*see* Brief in Opp., at 7). The fundamental question is the Government's amenability to suit. The specific issue is whether a litigant seeking to enforce private rights originating in contracts with the Government, authorized by a statute that waives sovereign immunity, will be foreclosed from all judicial relief because the contracts incorporate by reference, for certain of their terms, a federal statute that does not expressly waive sovereign immunity.

The case pits the constitutionally protected, private rights of the citizen directly against the perceived dictates of a federal policy embodied in a regulatory statute. It raises a most fundamental issue of the faith, credit, and obligation of the United States, namely, whether the citizen can rely on the availability of a federal forum for the enforcement of his contract rights, or whether he contracts with the Government at his peril, taking to himself all the risks and liabilities of the contract, but receiving none of its customary protections, such as mutuality of obligation, which constitute property rights. In addition, this specific case, because of its unusual jurisdictional setting, also involves the questions of which federal court properly hears the case, and which court has the power to review disputed issues. These are not questions of a passing or merely historical importance. Instead, they go to the very heart of a private citizen's commercial relationship with the Government and to the foundation of the federal judiciary's authority to resolve commercial disputes between the Government and private parties.

Respondents necessarily hold to the very narrow view, as did the TECA in reaching its decision, that this case "arises under"—and only under—the ESA. Based on this unduly constricted first premise, they conclude both that the Government is immune from suit and that the TECA has exclusive appellate jurisdiction over every issue in the case. In so doing, they ignore other equally justifiable sources of petitioner's right, such as the statute authorizing the Government's entry into the contracts in the first place (the OCSLA, which expressly waives sovereign immunity), the Constitution, and the contracts themselves (which traditionally have sufficed as grounds for invoking federal jurisdiction and overcoming sovereign immunity). Petitioner is entitled to a broader review of its pleading, which essentially alleges that it bought oil from the Government under contract and was overcharged. Any theory or form of action that

sustains this claim will be a basis for relief and should be separately evaluated in determining whether sovereign immunity bars relief and whether jurisdiction is properly exercised. *See Conley v. Gibson*, 355 U.S. 41, 48 (1957).

The TECA's limited view stems, understandably, from its special-purpose jurisdiction. The TECA, unlike the other courts of appeals, has an openly avowed, policy-based mandate "to wind up regulation of the oil industry." *Johnson Oil Co., Inc. v. DOE*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982). It is a court with a mission, and that mission, not the law, has produced the judgment sought to be reviewed. In a different case, such vindication of a "predominant" federal policy (*see* Brief in Opp., at 7) by a special-purpose tribunal might be seen as a laudable result, but here it is not, because important, constitutionally protected, private contract rights have been trampled in the bargain. Not only should this wrong be righted, but the Court should also take the opportunity afforded by this case to reaffirm that rights acquired under contract with the Government continue to be, as they traditionally have been, protected and are enforceable in the federal courts, that they cannot be vitiated by an after-the-fact claim of sovereign immunity, and that they are not subordinate to the vicissitudes of federal commercial policy.

II. The Court Should Resolve a Conflict Among the Circuits Concerning The TECA's Jurisdiction and Instruct Litigants and the Lower Courts on How to Apply the Appropriate Jurisdictional Standard

Contrary to respondents' statement (Brief in Opp., at 5), the Circuits are in conflict concerning the scope of the TECA's jurisdiction. The Second, Third, Fifth, Tenth, and District of Columbia Circuits, as well as the TECA, interpret the TECA's jurisdictional grant over cases and controversies "arising under" the ESA as requiring "bifurcated" appeals whereby the ESA is-

sues in a single controversy are reviewed by the TECA, and the non-ESA issues in the same controversy are reviewed by the appropriate court of appeals. *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979); *RJG Cab, Inc. v. Hodel*, 797 F.2d 111 (3d Cir. 1986); *United States v. Wyatt*, 680 F.2d 1080 (5th Cir. 1982); *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979); *United States v. Hill*, 694 F.2d 258, 260 n.5 (D.C. Cir. 1982); *Texaco Inc. v. DOE*, 616 F.2d 1193 (Temp. Emer. Ct. App. 1979). This interpretation results in the possibility of conflicting appellate judgments in a single case.

By contrast, the Sixth and Seventh Circuits construe the TECA's jurisdiction as arising only when the *entire* claim "arises under" the ESA, *Grand Blanc Educ. Ass'n v. Grand Blanc Bd. of Educ.*, 624 F.2d 47 (6th Cir. 1980); *St. Mary's Hospital of East St. Louis, Inc. v. Ogilvie*, 496 F.2d 1324 (7th Cir. 1974), thereby safeguarding against conflicting appellate judgments in the same case, but raising the possibility that truly different theories of relief, some perhaps arising under the ESA, others not, will be inappropriately lumped together for the expedient purpose of characterizing a claim and allocating jurisdiction. Neither of the prevailing interpretations furnishes an arbiter for jurisdictional disputes arising within the same case, nor does either interpretation articulate a standard for identifying so-called ESA issues or claims, and the Court has not previously addressed the issue.

The TECA's special jurisdiction, and the conflicting interpretations as to its scope, naturally produce confusion in the large number of cases, like this one, which present either a number of claims or allege different theories of relief. As of 1979, approximately thirty percent of the TECA's cases were decided on jurisdictional grounds, *Texaco Inc. v. DOE*, 616 F.2d 1193, 1199 (Temp. Emer. Ct. App. 1979) (Hoffman, J., dissenting),

and Congress's purpose in creating the TECA to achieve efficient and consistent review of ESA cases, *see Bray v. United States*, 423 U.S. 73, 74 (1975) (per Curiam), has been frustrated, with review often degenerating, as here, into multiple appeals, stays, and dismissals owing to uncertainty about the boundaries of the TECA's jurisdiction. *See generally Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 591 F.2d 711 (Temp. Emer. Ct. App.) (per curiam), *cert. denied*, 444 U.S. 879 (1979); *Gordon v. Laborers' Int'l Union*, 490 F.2d 133 (10th Cir.), *cert. denied*, 419 U.S. 836 (1974).

The prejudice of such confusion is plainly apparent in the present case. One appellate court, the Fifth Circuit, which has jurisdiction over any issue in the case that does not "arise under" the ESA, deferred, at least preliminarily, to the other appellate court, the TECA, which has claimed full jurisdiction (possibly for policy-based reasons), but which ultimately may not be entitled to exercise it. The confusion—and, hence, dispute—over whether petitioner's claims are jurisdictionally within the TECA's or the Fifth Circuit's province, or partially in both, has required petitioner to prosecute parallel appeals and to make and defend against numerous motions in order to preserve its procedural entitlement to a full review of all issues in each court. Nor is this the first case in which an appellate court has been tempted to defer to the TECA's claim of complete jurisdiction. In *Gordon v. Laborers' Int'l Union*, 490 F.2d 133 (10th Cir. 1974), the Tenth Circuit, though harboring serious doubts as to the wisdom of the TECA's prior ruling in the case, nonetheless deferred to the TECA's presumption of jurisdiction, accepting it, in the absence of any attempt to obtain certiorari review, as the "law of the case" in order to "avoid any semblance of a conflict with TECA." *Id.* at 139.

The present case squarely presents the conflict avoided by the Tenth Circuit in *Gordon* and points to the need for a standard with which to determine whether a case

"arises under" the ESA. Without it, litigants are left in confusion, and policy, not law, ultimately determines the parties' rights, including the important question of jurisdiction. We respectfully submit that the present case does not "arise under" the ESA, and that the TECA's determination that it does is erroneous and has led to the further erroneous conclusions concerning sovereign immunity and jurisdiction. A properly formulated "arising under" standard will allocate original and appellate jurisdiction in cases that allege numerous claims or separate theories of relief, and will also have the salient effect of reducing confusion, duplication, delay, and expense.

CONCLUSION

Some court of the United States must be competent to determine the liabilities of the United States on petitioner's commercial contracts. The petition should be granted so that the Court can confirm that contract rights do not yield to changing federal policy, and that sovereign immunity does not bar a private party's claim merely because a federal statute not expressly waiving sovereign immunity is incorporated by reference in a contract to which the Government is an authorized party. The petition should also be granted so that the Court can instruct litigants and the lower federal courts concerning the proper limits of the TECA's jurisdiction.

Dated: New York, New York
July 23, 1987

Respectfully submitted,

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